Supreme Court, U. S.
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No. 78-1463

In the Supreme Court of the United States

OCTOBER TERM, 1978

MICHAEL ARNONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that he did not violate 18 U.S.C. 1623 because he made only one false declaration before a federal grand jury and did not make two inconsistent statements; he also claims that his false statement was not material to the grand jury's investigation.

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on four counts of making false declarations before a federal grand jury in violation of 18 U.S.C. 1623. He was sentenced to four concurrent terms of one year's imprisonment. The court of appeals affirmed (Pet. App. A).

The indictment alleged and the evidence at trial showed that in August 1977 petitioner testified before a federal grand jury in the Eastern District of Michigan, which was investigating the involvement of

Sanford Hoskow and John Leming in illicit drug trafficking (Tr. 50). In the grand jury petitioner was asked about conversations about a proposed sale of cocaine that took place at his bar on May 6, 1976, and at which, at various times, petitioner, Hoskow, Marshall Stillman, a Drug Enforcement Administration informant, and a DEA undercover agent were present. Petitioner testified under oath that he was not present when Marshall Stillman was in possession of some white powder, and that he was not present during a conversation in which Stillman explained that the "stuff" would come directly from Bolivia and Peru, that the "stuff" was in rock form and nearly pure, and that Stillman's source was a major importer of "coke" who would not sell drugs in less then kilo quantities (Tr. 39-41).

The evidence at trial showed that this testimony was false. The DEA agent and the informant testified that petitioner was present at a table in his bar when Stillman discussed with them a prospective sale of cocaine. They also testified that at one point in the conversation, Stillman took petitioner and the informant into a back-room office and showed them a packet of white powder that Stillman said was cocaine, and that on several occasions, in petitioner's presence, Stillman said that his "stuff" was in rock form, nearly pure, and came from his source in Bolivia and Peru in kilo quantities (Tr. 122-128, 214, 222, 239-244, 247, 288-289, 295, 333-334).

Testifying in his own behalf, petitioner denied that he had overheard any narcotics-related discussion or seen Stillman's packet of white powder (Tr. 473-474, 479).

The district court ruled that petitioner's declarations to the grand jury were material to the grand jury's investigation (Tr. 561-564).

1. Petitioner's claim (Pet. 6-12) that 18 U.S.C. 1623 can be violated only by the making of two or more inconsistent sworn statements before a court or grand jury is frivolous. Section 1623(a) makes it unlawful for anyone who testifies under oath "in any proceeding before or ancillary to any Court or grand jury of the United States knowingly [to make] any false material declaration * * *." Section 1623(c) provides, as one method of proving the offense, that if an indictment alleges that the defendant "knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false," the indictment "need not specify which declaration is false * * *." While Section 1623(c) provides an alternative method of proving the offense described in Section 1623(a), it plainly does not limit the government to that method or establish as a necessary element of the offense the making of at least two sworn and inconsistent statements. And the courts have uniformly held that a single false statement may be prosecuted under Section 1623 upon proof that the statement was false. See *United States* v. *Devitt*, 499 F. 2d 135 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975); *United States* v. *Ruggiero*, 472 F. 2d 599, 606 (2d Cir.), cert. denied, 412 U.S. 939 (1973); *United States* v. *Clizer*, 464 F. 2d 121 (9th Cir.), cert. denied, 409 U.S. 1086 (1972). As the Second Circuit explained in *United States* v. *Lee*, 509 F. 2d 645, 646 (2d Cir.), cert. denied, 422 U.S. 1044 (1975), in considering and rejecting the precise

claim petitioner raises here, "[i]t is obvious that section 1623(c) * * * states one, but not the exclusive, method for proving falsity."[1]

2. Petitioner's claim (Pet. 12-14) that his false statements were not material to the grand jury's proceedings is contrary to the record and was correctly rejected by the district court. Although petitioner relies (Pet. 13) on the testimony of the grand jury foreman that his testimony did not have a "material effect on the grand jury's decision whether to pursue an investigation of Marshall Stillman" (Tr. 73), the testimony was still material to the investigation, as the foreman's full testimony made clear. Thus, the foreman testified that the grand jury was investigating the involvement of Hoskow and John Leming in illicit drugs (Tr. 50), that petitioner's testimony relating to conversations about a drug transaction in which Stillman and Hoskow participated was considered by the grand jury and was relevant to the investigation (Tr. 76-77, 79), and that the testimony was capable of influencing the grand jury's decision (Tr. 82-85). It is well established that the test for determining whether declarations are material is not whether they in fact influenced the grand jury but whether they were capable of influencing the grand jury on the issue before it. *United States* v. *DeMauro*, 581 F. 2d 50, 53 (2d Cir. 1978); *United States* v. *Damato*, 554 F. 2d 1371, 1372-1374 (5th Cir. 1977); *United States* v. *Kelly*, 540 F. 2d 990, 993 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977); *United States* v. *DeVitt, supra*, 499

[1]The authorities on which petitioner relies (Pet. 7-10) establish that the government is *authorized* to prove a false declarations offense by the inconsistent statements method of proof, not that it is *limited* to that method.

F. 2d at 139. In sum, on the basis of the record, the district court correctly concluded that petitioner's false statements were material to the grand jury's investigation.

It is therfore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1979

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